SUPREME COURT OF APPEALS OF VIRGINIA.

RICHMOND.

STONEBURNER & RICHARDS v. MOTLEY AND OTHERS.*

April 7, 1898.

Absent, *Cardwell*, J.

1. FRAUDULENT CONVEYANCES—*Reserving interest or control—Deferring sale till required by creditors.* A debtor cannot convey his property to a trustee to secure creditors and reserve an interest in or control over the property inconsistent with the grant, and adequate to its defeat, but a direction to the trustee, "when so required by the creditors, to take charge of said property and sell the same at public auction," is not of itself such reservation of interest or control as to avoid the deed.

2. FRAUDULENT CONVEYANCES—*Board and lodging as between husband and wife, and parent and child—Express promise after service rendered.* Board and lodging and the keep of a horse do not, as between husband and wife, parent and child, and other near relatives constitute a consideration from which the law will imply a promise of payment, and no action can be maintained therefor in the absence of an express contract or engagement to pay for them. Nor can an express promise to pay, made after the supplies have been furnished or the services rendered, be enforced against the promisor to the prejudice of his creditors.

3. FRAUDULENT CONVEYANCES—*Elimination of one debt by appellate court—Estimates of value of property conveyed.* Where a deed of trust to secure creditors has been assailed by an unsecured creditor, and one of the secured debts has been stricken out by the appellate court as fraudulent, that court will not, upon mere estimates of the value of the property conveyed, declare that it is not more than sufficient to pay the other secured creditors whose debts are not disputed.

4. DEED TO SECURE CREDITORS—*Debt valid in part and void in part.* Though a part of a debt secured in a deed of trust may be held to be without consideration, and the deed to that extent void, it nevertheless furnishes a valid security for the balance of the debt not tainted with fraud, and founded on a valuable consideration. In the case in judgment a part of the debt is founded on a sufficient consideration.

5. DEED TO INDEMNIFY SURETY—*Disposition of fund till liability of surety is fixed.* Where a deed of trust is given to indemnify a surety in a given amount, and it does not appear that the surety has been required to pay anything on account of his suretyship, a court of equity, in administering the trust, should not direct the amount to be paid to the surety, but should hold it until it can be ascertained whether or not there will ultimately be any liability on the surety.

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* Reported by M. P. Burks, State Reporter.

6. COUNSEL FEES—*Allowance by court.* While in proper cases courts of equity may make allowance for counsel fees to be paid out of funds under the control of the court, it is a power capable of great abuse, and should be exercised with the utmost caution and a jealous regard for the rights of the litigants.

Appeal from decrees of the Circuit Court of Essex county, pronounced June 16, 1895, and January 4, 1896, in three suits in chancery heard together, wherein the appellants and others were respectively the complainants, and the appellees were the defendants.

Reversed.

The deed assailed in this case conveyed, amongst other things, two stocks of goods. The following is a copy of the deed, omitting the names of creditors and the amounts secured:

"This deed made and entered into this 20th day of January, 1894, between D. P. Motley, of the first, W. E. Wright, of the second as trustee, and the following creditors, of the third part, witnesseth: That whereas the said D. P. Motley is indebted to various persons in sums herein named, which he wishes to secure. Now, therefore, in consideration of the premises of five dollars in hand paid him by said W. E. Wright, trustee, he doth grant unto said trustee the following property: His property and stock of goods at Rexburg, estimated at $1,000; at Battery at $800; large sawmill and fixtures at $400; small sawmill and fixtures at $300; one horse at $50; ten mules at $750; four wagons and gear at $100; five ox carts and yokes at $50; six yoke of oxen at $240; interest in Tappahannock Machine Works at $600; twenty acres of land at Battery at $200; land bought of Dr. Lewis at $150; lot of land adjoining Motley's mill at $10; standing timber at $600; store accounts due, $800; interest in lumber on hand, $400. In trust to secure, &c. . . . .

"The said trustee when so required by the creditors to take charge of said property and sell the same at public auction, to the best advantage of all parties and out of the proceeds, after paying the costs of drawing and executing this deed, shall pay the first class creditors in full, next the second creditors in full, and if any surplus remains, he shall pay over the same to the grantor or to his order.

"Witness the following signatures and seals this the day and year first herein written."

The case was referred to a commissioner to "inquire and ascertain who had charge of the mercantile business of D. P. Motley at Rexburg and Battery, in Essex county, from the 20th day of January, 1894, to the date of sale." Upon this point the commissioner reported:

"That W. T. Noil had charge of the mercantile business of D. P. Motley at the Battery, and that J. R. Kidd had charge of the mercantile business of said Motley at Rexburg, both from the 20th day of January, 1894, to the date of sale

by Trustee Wright, J. R. Kidd taking charge as agent for W. E. Wright, trustee, on Monday, the 22nd day of January, 1894, at Rexburg, and W. T. Noil taking charge at the Battery as agent for same some time during the same week."

Pollard & Sands, for the appellant.

W. W. Woodward, J. W. Fleet, W. O. Carter, Thos. Croxton, Richard H. Bagby and *H. I. Lewis*, for the appellees.

KEITH, P., delivered the opinion of the court.

D. P. Motley, being embarrassed, executed a deed of trust to W. E. Wright, trustee, for the benefit of certain creditors therein named, which deed is attacked as fraudulent as to them by the appellants, Stoneburner and Richards, and other creditors of D. P. Motley. They allege that the deed reserves to the grantor an interest and control over the property inconsistent with its avowed objects and adequate to their defeat. The deed, after conveying certain property to the trustee, directs him, "when so required by the creditors, to take charge of said property and sell the same at public auction." The language quoted is relied upon by appellants to avoid the deed. The principle invoked is abundantly sustained by authority. See *Catt* v. *Knabe*, 93 Va. 736. But the deed under consideration is not within its terms. It contains no reservation of any interest or control in the grantor. The property is conveyed without condition to the trustee, and those for whose benefit it was made have full power and dominion over it. There was no error, therefore, in the decree of the Circuit Court upon this point.

The deed was also assailed by appellants as being fraudulent in fact because it "secures J. R. Motley about $2,400 due him and for which he is liable as surety" of the grantor. J. R. Motley is the father of D. P. Motley, the grantor, and $1,200 of the amount secured, as shown by the account filed in the record, is "for board of horse, self, and furnishing horse 12 years at $100 per annum." There is no pretence that for this sum there was any antecedent contract by which the son bound himself to pay his father anything. As between strangers board and lodging and the keep of a horse would constitute a consideration from which the law would imply a promise to pay; but it is well settled that as between persons standing to each other in the relation of husband and wife, parent and child, grand-parents, brothers, stepchildren, and other near relations, no action can be maintained for such services, in the absence of an express contract or engagement

to pay for them. The rule, says Chancellor Green, in *Updike* v. *Titus*, 2 Beasley at p. 153, "rests upon the simple reason, that such services are not performed in the expectation or upon the faith of receiving pecuniary compensation. Ordinarily, for a service rendered, the law implies a promise to pay corresponding with the value of the service; but for services rendered by members of a family to each other no promise is implied for remuneration, because they were not performed in the expectation, by either party, that pecuniary compensation would be made or demanded. The authorities upon this subject are numerous and decided, and the principle upon which they rest too clear for doubt."

"An express promise cannot be supported by a consideration from which the law could not imply a promise except where the express promise does away with a legal suspension or bar of right of action, which, but for such suspension or bar, would be valid." *Beaumont* v. *Reeve*, 8 Adolp. & Ell. 486.

The principle is stated by Wightman, J., in the same case, as follows: "A precedent moral obligation, not capable of creating an original cause of action, will not support an express promise."

It is clear that independent of the express promise on the part of the son made after the services were rendered there could, in this case, have been no recovery upon the original cause of action, for it rested upon no consideration from which the law would have implied a promise to pay, and therefore the subsequent promise is insufficient. See, in addition to authorities already cited, *Cook* v. *Bradley*, 7 Conn. 57; *Mills* v. *Wyman*, 3 Pick. 207; *Wennall* v. *Adney*, 3 B. & P. 249; and *Hack* v. *Stewart*, 8 Barr, at p. 217.

The latter case is similar in many of its aspects to that under consideration, the father having conveyed to the son, in consideration of work and labor done by the son after he became twenty-one years of age. The conveyance was held to be fraudulent as to the other creditors of the father.

As to the item of $1,200 the contention of the appellants should have been sustained.

It is claimed on behalf of appellees that the appellants were not injured by the ruling of the court in dismissing their bill, because they say that the undisputed debts secured in the deed would have exhausted the property conveyed before reaching them, even though appellants were successful in every contention they make.

This suggestion would require us to rely upon estimates possibly

erroneous and misleading, and courts should be careful when an error to the prejudice of a litigant is established to decline to correct it upon the idea that it works no injury. Presumably all error is prejudicial, and to warrant the court in disregarding established error upon the theory that the other party is not aggrieved thereby it should be made very plainly to appear that such is the fact.

The account of D. P. Motley with J. R. Motley, to which we have already referred as to the item of board, etc., amounts in the aggregate to $2,733.62½. Striking out the $1,200 for board leaves a balance of more than $1,500; which is claimed to be due for timber, ties, corn, and other property sold by the father to the son. This claim rests upon a different ground from that for board. The son was in active business, and dealing in the purchase and sale of such articles as are found in the account under consideration. The evidence tends to rebut the presumption that these items were delivered by the father as a gift, and they therefore constitute a good consideration for the deed of trust, though a part was barred by the statute of limitations at the time of its execution. Striking out, therefore, the item of $1,200, the residue of the account is free from objection.

It is claimed by appellees that the deed secured J. R. Motley $2,400 due him and for which he is liable as surety of the grantor, and there is evidence proving that as surety he was responsible for about $1,000, which, added to the $1,500, amounts to more than the $2,400 for which the decree was rendered in favor of J. R. Motley. There is no proof, however, that J. R. Motley has paid or will be required to pay as surety the debts for which he is bound as such, and the decree appealed from directs the sum of $2,400 to be paid to him, or his attorney, unconditionally. If the $2,400 decreed to be paid embraces the $1,200 for board it was erroneous for the reasons already stated. If it consisted of the $1,500 named in the account between the father and the son, and the liability of the father as surety is to be looked to to make up the sum of $2,400, then $900 should have been retained by the court until it could be ascertained and determined whether or not ultimate liability as surety would fall upon J. R. Motley.

Another objection taken to the decree of the court below by appellants is because it allows a fee ot $500 to counsel for R. M. Sutton & Co. and extra compensation to the trustee for services rendered by him.

There are cases which justify courts in making allowance for fees to counsel to be paid out of funds under their control, a power capa-

ble of great abuse and one which should be exercised with the most jealous caution, and regard to the rights of the litigants. In most cases it is better to leave those concerned to contract for the compensation to be paid for the services rendered or received. But while this is true, it is also true that where parties to a suit unrepresented by counsel reap the benefit of services rendered in the progress of a cause, it is right and proper that those who received the benefit should be required to make just compensation for it. But we repeat it is a power which is very capable of being abused, and should therefore be cautiously exercised lest thereby the administration of justice be brought into reproach.

The fee of $500 was allowed in this case because, as is stated in the decree, the fund "arising from the sale was largely increased" by a sale of the property on time, as a result of the litigation, instead of for cash, as provided for in the deed. Any party to the deed could have insisted upon the execution of the deed in accordance with its terms, and any change made in it must therefore have been the result of agreement among the parties, and not of any particular service rendered by counsel, and the fee allowed would seem to be a very generous compensation for the service performed; there is reason to believe, however, that upon this point the decree was rendered with the assent of those affected by it, and, as the cause must go back to the Circuit Court to be further proceeded in, we express no opinion beyond what has already been said upon the assignment of error with respect to the fees of counsel and the allowance to the trustee, but will leave these items to be further considered and disposed of in the Circuit Court.

For the reasons stated, the decree complained of must be reversed.

Reversed.

NOTE: The principle applied in this case, that the law will not *imply* a contract to pay for services rendered by one near relative to another, in the absence of an express contract, has been applied in two Virginia cases. In *Williams* v. *Stonestreet*, 3 Rand. 559, a claim by a son-in-law for nursing his father-in-law in his last illness was rejected. There was no express contract to pay for the services. *Judge Cabell*, delivering the opinion of the court, says: "There was no contract, express or implied; and, considering the relation between the parties, the services were such that no compensation ought to have been expected." In *Harshberger* v. *Alger*, 31 Gratt. 52, 66, a similar claim asserted by a daughter against the estate of her mother was rejected. *Burks*, J., delivering an opinion in which all the other judges concurred, says: "As between parent and child (adult) the common law imposes no obligation on either to support the other, not

even to furnish necessaries in the strictest sense of that term; but there is a high moral duty on each to render the other all needful assistance. . . . Whenever, therefore, compensation is claimed in any case by either against the other for services rendered or the like, it must be determined from the particular circumstances of that case whether the claim should be allowed or not. There can be no fixed rule governing all cases alike. In the absence of direct proof of any express contract, the question always is: Can it be reasonably inferred that pecuniary compensation was in the view of the parties at the time the services were rendered? And the solution of that question depends on a consideration of all the circumstances of the case, the relations of the parties being one of these circumstances." The claim asserted in the principal case, and rejected by the court, seems clearly to have been an afterthought, and was properly rejected.

The subject of fraudulent conveyances is too large to be discussed in a note, but we beg to call attention to deeds of trust on *fixtures*. Nothing is more common than for a merchant to convey his *stock and fixtures* in trust to secure creditors, and in some cases the fixtures are of more value than the stock. From *Lang* v. *Lee*, 3 Rand. 410, down to *Hughes, Effinger & Co.* v. *Epling*, 93 Va. 424, it has been uniformly held that a deed of trust on a stock of goods left in possession of the grantor, with power to sell in course of trade and appropriate proceeds till default in the payment of the debt secured, is void. But how about the fixtures—the show cases, the handsome prescription counters, the shelf bottles, soda fountains and other expensive fixtures in a drug store? These are permanent in their character and not intended for sale—certainly not for sale in the usual course of business. They are as valuable as horses, more permanent in their nature, and less expensive to keep. *If* a part of a debt secured may be fraudulent and the balance valid, and the deed held valid as to such balance, why may not a deed which conveys stock and fixtures be held void as to the stock, but valid as to the fixtures? No answer has been given to this question by the Virginia cases, though deeds have been held void as to both *stock and fixtures* in at least two cases. In *McCormick* v. *Atkinson*, 78 Va. 8, the stock and fixtures of a drug store were conveyed to secure a bond payable three years after date, with power to the trustee to take possession and make sale upon request of the creditor secured *after default* in the payment of the bond. No express powers were reserved by the grantor, but the court said that by fair implication the grantor had the power of sale, and the deed was void as to both *stock and fixtures*. The question of the validity of the deed as to the fixtures did not escape the attention of the court, but was pointedly made in the petition for the appeal in the following language:

"If his (petitioner's) claim be not valid to the said 3-10 of the changeable stock, which remained in kind until sold herein by the special receiver, Hancock, on what principle can it be denied its lien on the permanent and unchangeable fixtures? No case in Virginia goes the length of an intimation that such personal property as this cannot be safely embraced in a deed of trust. Upon principle, such personalty cannot differ in this respect from the countless varieties of personalty which may always safely be embraced in a deed of trust as against all comers. They were located at the time of the subsequent creation of the liens of the execution of F. H. Bonley's creditors where they were located when petitioner's trust deed was recorded—at a drug store in Winchester—an exceptional establishment, giving character and locality to such articles; and the recorded deed so

described them—the deed recorded long prior to the creation of those execution liens. If a flock of sheep or a herd of horses or cattle, the fixed stock of a farm, can be embraced in a deed of trust so as to be permanently bound by it, they are liable, although their increase may not be; and if the fixtures of a store, which are the basis on which its trade operates and is built, are in likewise embraced in a trust deed, they are bound, although what they add to the store in their profits and increase of stock may not be. See *Sipe* v. *Earman*, 20 Gratt. 563, &c. In this case, as in that, the interest was payable annually. See 20 Gratt. p. 568.

"It can scarcely be seriously maintained that because petitioner's deed may not be broad enough to cover all the stock or any of the stock, because it may be held invalid or fraudulent in law as to all or any of the stock, therefore the fixtures or any other property (real or personal) clearly covered by it, cannot be claimed by its lien. It may be effective for part, and not affective for the residue of the property conveyed." And yet the deed was held void as to the *fixtures* as well as the stock.

In *Saunders* v. *Waggoner*, 82 Va. 316, the property conveyed consisted, amongst other things, of a stock of goods, two tracts of land, leaf tobacco, fixtures in the tobacco factory and in the store, horses, cattle, &c., &c. The deed provided that the grantor should "*hold, occupy and enjoy the use and profit* of the property therein conveyed for the term of two years," upon paying ten *per cent.* of the debts of the first class every four months; and provided for a sale if two of such payments should be in default at any time, and a majority of the creditors secured should request a sale. Subsequent creditors levied executions upon the personal property conveyed, consisting of the stock of goods, fixtures, and cattle above mentioned, and the question presented was which had the better claim. *The deed was held void, and the executions creditors given priority.* Whether the deed was void as to the land conveyed was not involved in the decision, as the executions were levied only on the personal property. The fixtures were treated as personalty and held liable to the executions. The language of the opinion is broad enough to cover the land also, and we can see no distinction between that and the horses and cattle on the land. The language used is: "The deed of trust of March 15, 1884, reserves upon its face powers of use, enjoyment, and dominion over the property conveyed, inconsistent with its avowed object and entirely adequate to the defeat thereof, and, by all the authorities, and upon reason and justice, the deed is thereby rendered fraudulent, null and void, as against creditors and purchasers." The reservation was not adequate to defeat the deed as to any of property conveyed except the stock of goods and possibly the tobacco. It will be observed that the only reservation by the grantor was the right "*to hold, occupy and enjoy the* USE AND PROFIT" of the property conveyed for the space of two years, upon certain conditions, and yet the deed was held *void as to all the property levied on*, including fixtures, horses and cattle. No power of sale was reserved by the grantor. He was simply to hold, occupy and *enjoy the use and profit.*

The reasoning of the court is not altogether clear, but we think it is to be inferred that the court meant to declare that the reservations as to the stock of goods showed an intent to defraud at least as to them, and that this tainted the entire deed, and hence the *deed was wholly fraudulent.*

If an inconsistent reservation as to a part of the property conveyed is such an evidence of fraud as taints the entire deed and renders the conveyance void *in*

toto, it would seem, on principle, that where a gross sum is secured to one creditor and it is shown that there was no consideration for one-half of the debt, but that an effort was made to secure by fraud more than was due, he should be excluded altogether. Otherwise he risks nothing. He should be made to pay the penalty of seeking to recover what he is not entitled to.

In each of the above cases the deeds were assailed *before* the trustee had taken possession. In *Lang* v. *Lee*, 3 Rand. 410, 431, *Judge Coalter* said: "Had the trustee, Browne, taken possession of the goods before the second deed of trust it might have been another matter, or before a judgment recovered against Lee, in case of a judgment creditor. This was not done. Such an act of taking possession, might, from its date, have purged the deed of its original vice, by discharging it of that condition, which rendered the lien abortive." The debtor then no longer continues to be "owner or not, of his goods, at the election of one creditor." The above language of Judge Coalter is quoted with approval by Judge Daniel in *Sheppards* v. *Turpin*, 3 Gratt. 373, 401, but it does not seem that the point was necessary to the decision of either case, or was in fact involved in either. But a line of *dicta* is quite as potent as a case in point. "A *dictum* is sometimes made the starting-point for a line of direct decisions, which, notwithstanding the origin on which they rest, are too weighty, in their accumulated strength, to be overthrown." Black on Interpretation of Laws, p. 398. See also *Bradley Salt Co.* v. *Norfolk &c. Co.*, 95 Va. 461.

In the principal case the trustee took immediate possession, and it seems that the court must have entertained the view suggested by Judge Coalter that this "purged the deed of its original vice."

For a full note on the subject of fraudulent reservations by grantors, see 15 Am. St. Report, 912. M. P. BURKS.

PACE V. PACE'S ADMINISTRATOR, AND OTHERS.*

Supreme Court of Appeals: At Richmond.

April 7, 1898.

Absent, *Cardwell* and *Buchanan*,† JJ.

1. SUBROGATION—*Decedent's estate—Debt paid by co-surety—Amount for which he may prove.*—The liabilities of the estate of a decedent, and the rights of his creditors, are fixed by his death. If at that time a creditor has the right to prove against a decedent's estate a debt for which the decedent and another are bound as sureties, and subsequently the co-surety pays the debt, he is substituted to the right of the creditor, and may prove the whole debt against the estate of the decedent, and receive dividends thereon until one-half of the debt is paid, although the estate of the decedent will not pay his debts in full.

Appeal from a decree of the Corporation Court of the city of Danville, pronounced March 16, 1896, in a suit in chancery wherein John

* Reported by M. P. Burks, State Reporter.

† Judge Buchanan was interested in the question involved.